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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ROOSEVELT STEAMSHIP COMPANY, INC., RESPONDENT.

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BRIEF FOR ROOSEVELT STEAMSHIP COMPANY, INC., RESPONDENT.

Certiorari was granted on October 12, 1942, to review a decision of the Circuit Court of Appeals for the Second Circuit, which reversed, with one dissent, a judgment of the District Court for the Southern District of New York, after a trial by jury, and which dismissed the complaint. The opinion of the Circuit Court of Appeals (R. 115) is reported at 128 F. (2d.) 169. The District Court wrote an opinion in connection with a motion which was made before trial. R. 39. It is unreported. An opinion was not written by the District Court at the trial. However, the District Court expressed an opinion during a colloquy between court and counsel. R. 97.

STATEMENT.

This case arises out of an accident which occurred on July 9, 1938, when the steamship *Unicoi*, owned by the United States, had just arrived at Pier 58, North River,

New York. Shortly thereafter, a ladder which was approximately thirty or forty feet long, was put down from the vessel to the dock. Thereupon, James P. Brady, who was employed by the United States as a customs inspector, and who had duties on board the vessel, climbed this ladder, and, while he was doing so, one of the rungs broke, causing him to fall to the rung below. As a result of this, Mr. Brady became ill with appendicitis, for which there was an operation. Following the operation, and on July 20, 1938, he died.

Because Mr. Brady was an employee of the United States at the time of his death, his widow and minor children were entitled to obtain compensation from the United States under the provisions of the United States Employees' Compensation Act, 5 U. S. C. §751 *et seq.* Before the expiration of the two years permitted for bringing actions for damages on account of negligence against the United States, under the provisions of the Suits in Admiralty Act (46 U. S. C. 745), Mr. Brady's widow chose to exercise the remedy given by the United States under the Compensation Act, received payments thereunder, and, presumably, is still receiving them. Under the law she was, and is, entitled to such payments for the rest of her life, or until remarriage. 5 U. S. C. §760 (a).

In petitioner's brief in the Circuit Court of Appeals it was stated that a daughter, aged 15 at the time of the death, had received compensation for three years, and that the other child, a son, aged 20 at the time of the death, was not eligible for compensation. Appellee's Brief, C. C. A., p. 19.

By accepting compensation, Mrs. Brady and the daughter relinquished their right to sue the United States. *Dohs* v. *Davis*, 258 U. S. 421.

In addition to exercising the remedy under the United States Employees' Compensation Act, the widow, as Administratrix of her husband's estate, brought the present action

against Roosevelt Steamship Company, Inc., to recover damages, on the ground that her husband's death had been caused by negligence for which it was responsible.

Roosevelt Steamship Company, Inc. is a private corporation, and had entered into a contract with the United States of America, acting through the U. S. Maritime Commission, by which it agreed, as managing agent, to manage, operate and conduct the business of a steamship line which belonged to the United States "for and on behalf of the owner, and under its supervision and direction." This steamship line was known as "American Pioneer Line", a trade name, which also belonged to the United States. R. 24.

The contract is set forth in full at pages 21 to 32 of the record. In the preamble it was noted that Roosevelt Steamship Company, Inc. was already operating the line under a contract which was about to be terminated (R. 21-22), that the Maritime Commission had not been able to charter the vessels on favorable terms pursuant to the Merchant Marine Act of 1936, and that the Maritime Commission had determined, pursuant to Section 707 (c) of that act (46 U. S. C. 1194), to operate the line, itself, temporarily.

Section 707 (c) of the Merchant Marine Act of 1936 provided that, in circumstances such as those referred to in the preamble, and until such time, and upon such operating agreements as the Commission might deem advantageous, the vessels referred to therein "shall be temporarily operated *by the Commission* for its account by private operators."

Therefore, both the statute and the contract which depended on it proceeded upon the assumption that the operation of the vessels was by the United States, and that the "private operator" referred to in the statute was the

instrument of the United States "by" which this Congressional intent as to operation was to be accomplished. As used in the statute, the phrase "private operator" meant merely "non-governmental operator." It did not mean "operator with a private interest", as the petitioner would imply. The enterprise contemplated by the statute was not private enterprise. It was government enterprise, lock, stock and barrel. The agent was not to work for itself. It was to serve the United States as a means by which the United States might make money in the shipping business while the United States remained in it temporarily because it could not get out of it.

Pursuant to the statute and as a fulfilment of the Congressional intent as above set forth, the contract provided that the capital to be employed, the expenses to be incurred, the profits to be gained, and the losses to be borne, belonged to the United States. R. 21, 24, 25, 29, 30. Roosevelt Steamship Company, Inc. was entitled only to be reimbursed for its expenses. For its services it was paid nothing. R. 25, 29, 30. The United States retained full supervisory powers over the conduct of the agent. R. 22, 25, 26, 27. It was provided that "All business shall be carried on in the name of the Line for the account of the Owner." R. 24. This meant that all business was to be carried on in the name of the United States, doing business under the name of "American Pioneer Line", a trade name owned by the United States, which, incidentally, was guarded jealously by its owner. R. 24.

In view of the foregoing, therefore, Roosevelt Steamship Company, Inc. could not be, and was not, either a bare boat charterer, an owner *pro hac vice*, or an independent operator or contractor. It was a managing agent of the United States, and described as such.

The plaintiff claimed that the ladder which broke and caused the accident belonged to the defendant. R. 2. There was no proof of this. On the contrary, the contract between the United States and Roosevelt Steamship Company, Inc. showed that the vessel, and equipment, belonged to the United States. R. 21, 26.

Plaintiff claimed further that the ladder was furnished and supplied for the use of deceased by the defendant, its agents, servants and employees. R. 2. The only proof of this was that the ladder was put down from the vessel to the dock by persons on the vessel while the ship was being made fast to the dock and before the gangway was put down. R. 62. It was inferable, therefore, that certain unidentified members of the crew had furnished the ladder. Furthermore, only two items of evidence were offered in an attempt to prove that these unidentified members of the crew were the servants of the defendant. Neither item proved it. Each item proved the contrary. The first item was the written contract between the United States of America and Roosevelt Steamship Company, Inc., already referred to. R. 54, 21-32. The second item was the testimony of Andrew Finch, Vice President of the defendant. He testified that Roosevelt Steamship Company, Inc. operated the vessel under the above-mentioned contract, that Roosevelt Steamship Company, Inc. did *not* hire any of the members of the crew, that its only connection with the crew was to recommend to the Maritime Commission the hiring of the licensed officers, that the other members of the crew were hired by the Maritime Commission without any recommendation or participation on the part of Roosevelt Steamship Company, Inc. R. 53, 54, 55, 18, 19. Rules of Civil Procedure, 26, d, 4.

Proof of negligence consisted of an inference to be drawn from the fact that the rung of the ladder broke, and from

the testimony of a witness who described the condition of the broken piece which remained on the ladder. He said it looked rotten. R. 64.

Thus, the case against the defendant was purely one of an alleged liability for the negligence of the crew of the Government's vessel. Apart from this there was no fault alleged or proved against the defendant. And this was not the personal fault of the defendant.

Respondeat superior has been referred to accurately as a type of liability without fault. (1932) 81 Pa. Law. Rev. 130 at 142. That is the liability which the plaintiff endeavored to impose on the defendant. It depended on who employed the crew, which alone was at fault.

At the close of the plaintiff's case defendant moved to dismiss the complaint on the ground that there had not been any proof of negligence on the part of the defendant, "or on the part of any person for whom this defendant would be legally responsible." The motion was denied, and an exception taken. R. 83. The motion was renewed at the end of the entire case, together with a motion for a directed verdict, and the same ruling was made and exception taken. R. 103. The District Court ruled that it was bound by the ruling of the Circuit Court of Appeals in the case of *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190 (1941), which had held that a mere managing agent is the employer of the crew of a United States owned merchant vessel. R. 97.

In addition to these motions, which related to the merits, the defendant moved to dismiss, both before the trial and during the trial, on the ground that the court did not have jurisdiction of the subject-matter, by reason of the decision of this court in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation* and *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930). R. 11, 90, 91.

Defendant contended that, as construed by that case, the Suits in Admiralty Act, 46 U. S. C. 741, *et seq.*, provided the exclusive remedy which the plaintiff had for the tort, if any, which had been committed, and that that act excluded suits brought elsewhere than in Admiralty, not only against the United States, and against wholly government-owned corporations, but also against private corporations which were, like the defendant in the case at bar, acting as managing agents of the United States. R. 91, 12.

The motion which was made before trial was made on affidavits, one of which was the affidavit of the District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York. This affidavit asserted the financial interest of the United States in the case, and on behalf of the United States asked that the action be dismissed for lack of jurisdiction. R. 13, 14, 15. The motion was denied, with an opinion. R. 39, 40. The opinion was based on a misapprehension of the question which was before the court. R. 40; 128 F. (2d) 169, at 170. The court thought, mistakenly, that the question which was before it was controlled by the District Court decision in *Quinn* v. *Southgate Nelson Corporation*, 36 F. Supp. 873 (1941). But in that case the only question involved was whether the managing agent employed the crew. The jurisdiction of the court as affected by the Suits in Admiralty Act was not involved.

On the trial the motion to dismiss for lack of jurisdiction was renewed. On this occasion the motion was made on the basis of the operating contract and the testimony of Mr. Finch, *supra*, which had been introduced by the plaintiff, and also on the basis of additional testimony introduced by the defendant and received by the court in the absence of the jury. R. 83. This was the testimony of Mr. Collins,

who, again representing the interests of the United States, objected to the maintenance of the action, and pointed out that, if any judgment were obtained against the defendant, and paid by it, the United States would have to reimburse the defendant. R. 84, 85.

At this point in the trial, defendant also attempted to prove that in actual practice the Maritime Commission treated disbursements made by an agent in payment of tort judgments as "expenses incidental to the management and operation of the line," which were payable under the contract by the United States. R. 86, 87, 88, 98, 99. Temporary Operating Agreement, Clauses 6, 7, 19, R. 24, 25, 29, R. 24. Evidence on this subject was relevant because the plaintiff contended that "operating expenses" did not include such disbursements. R. 87. Since the contract itself contained nothing specific in this regard, and since there was controversy and consequent uncertainty as to the meaning of the general words, the actual practice (usage) of the parties was relevant to show what the parties meant in using those words. For this purpose defendant called Mr. Wilbur F. Carley, certifying officer of the Maritime Commission, whose duty it was to certify to the Treasury Department for payment the expenses incurred in connection with the operation of the vessels. R. 86. He was not permitted to testify. R. 88.

The Trial Court's reason for excluding this evidence is somewhat obscure. At one point the court said, R. 87:

> "I haven't read through the agreement itself, but a recovery in such an action as this would be included among the disbursement payments which would be submitted by Roosevelt Steamship Company to the Maritime Commission."

The Decisions Below.

Reference has been made already to the decision of the District Court which denied the motion made before trial with regard to jurisdiction. It has been pointed out that this resulted from a misapplication of the Quinn case, (District Court Opinion, 36 F. Supp. 873), which had nothing to do with jurisdiction.

Reference has also been made to the decision of the District Court which denied the motion made at the trial to dismiss the complaint on the merits because Roosevelt Steamship Company, Inc. was not the employer of the members of the crew who committed the negligent tort. In denying this motion the District Court applied the actual decision in the *Quinn* case, 121 F. (2d) 190 (C. C. A.). There is no doubt that the Circuit Court had ruled that a managing agent was the employer of the crew.

The District Court at the trial also denied the motion made to dismiss the complaint on the ground of lack of jurisdiction of the subject matter. R. 98. Here, again, the court misapprehended the question which was before it for decision. R. 97, 128 F. (2d) 169, at 170. The District Court thought that the *Quinn* case controlled. Of course it did not. The question which was before the court on this motion was not, as the District Court thought, whether the defendant employed the crew, but whether, if it did employ them, the United States only was suable for a tort of which the crew had been guilty.

The District Court did not require the jury to pass specifically on the question as to whether defendant employed the crew. Following the *Quinn* case, the court assumed that the defendant employed them and left to the jury simply the question whether the deceased was injured as a

result of the negligence of the defendant, *i.e.*, negligence for which the defendant was responsible. Charge, R. 104-109.

Accordingly, the jury brought in a verdict in the sum of $19,000. R. 111. To this, the clerk added interest from *the date of the death* at the rate of 6%, bringing the total to a judgment of $22,760. R. 112. Incidentally, it should be noted that had the United States been sued directly, pursuant to the provisions of the Suits in Admiralty Act, interest on a decree against the United States would have been at the rate of 4% *from the time of the decree* until satisfaction. 46 U. S. C. Section 743.

The Circuit Court of Appeals reversed the judgment. In line with its previous decision in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, cert. denied, 314 U. S. 682, it assumed that the defendant employed the crew on its own behalf as an agent for the United States. 128 F. (2d) 169, 170. However, it held that, since a maritime tort was involved in this case, the Suits in Admiralty Act provided the exclusive remedy for prosecuting such actions as the plaintiff's, namely, one based on a claim for damages for an alleged maritime tort committed by servants of an agent (so the court held) of the United States in the operation of a United States-owned vessel. In so holding, it relied solely on the decision of this court in *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930).

Statutes Involved.

Suits in Admiralty Act, 46 U. S. C., §§741, 742 provide as follows:

> "§741. *Exemption of United States vessels and cargoes from arrest or seizure.* No vessel owned by the United States or by any corporation in which

the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States, or of such corporation or operated by or for the United States, or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company."

"§742. *Libel in personam.* In cases where, if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem, or in personam, in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application

of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

The Questions Presented.

Two questions are presented. The first is whether, assuming that Roosevelt Steamship Company, Inc., acting as agent for the United States, employed *on its own behalf* the members of the crew who committed the tort, the Suits in Admiralty Act permits and, therefore, requires suit to be brought against the United States in Admiralty, and forbids suit being maintained against the agent. The second question is whether the members of the crew who committed the tort were employed by and *on behalf of* Roosevelt Steamship Company, Inc. or by and *on behalf of* the United States.

The first question is the one which the petitioner asked this court to review.

The second question is involved also, for, if the agent did not employ the members of the crew on his own behalf, it could not be liable for the tort in any event, and the defendant's motion to dismiss on the merits should have been granted. The District Court denied defendant's motion to dismiss on this ground because it considered itself bound by the decision of the Circuit Court of Appeals in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. R. 97, 83, 103. The Circuit Court of Appeals also followed that decision. 128 F. (2d) 169, 170.

If, however, that decision is wrong, and, accordingly, the agent did not employ the members of the crew who committeed the tort, the judgment of the Circuit Court which dismissed the complaint is correct, although for a further and different reason from the one given by the Circuit Court of Appeals.

Defendant below raised and preserved the point properly and is entitled to have it passed on in this court. R. 83, 103.

Le Tulle v. *Scofield*, 308 U. S. 415, 421 (1939);
Ryerson v. *United States*, 312 U. S. 405, 408 (1940);
Bondholders Committee, etc. v. *Commissioner of Internal Revenue*, 315 U. S. 189, 192, note 2 (1942).

ARGUMENT.

POINT I.

THE SUITS IN ADMIRALTY ACT PROVIDES AN EXCLUSIVE REMEDY FOR THE CAUSE OF ACTION ASSERTED BY THE PLAINTIFF AGAINST THE DEFENDANT.

The Circuit Court reversed the judgment below because of the controlling decision of this court in *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320 (1930).

It is not contended that the *Lustgarten* case was wrongly decided. Petitioner says it was correct. Petitioner's Brief, pp. 17, 18. So do we.

The question before the court, then, is what that case decides, and whether it applies here.

A. THE HOLDING IN THE LUSTGARTEN CASE.

In the *Lustgarten* case a judgment in the sum of over $10,000 had been obtained against the United States Shipping Board Emergency Fleet Corporation and against Consolidated Navigation Company, Inc., a private corporation, which was exactly like the defendant in this case, and which was acting in the same manner as managing agent for the United States, on account of a tort suffered

by a seaman through the negligence of the master and officers of a Government owned merchant vessel who refused to give him medical treatment for an injury. 280 U. S. 320, at 323. This judgment, which was rendered on the theory that Consolidated Navigation Company employed the master and officers on its own behalf and was therefore responsible for their acts, was reversed by this court, on the ground that, if the foregoing was true, the Suits in Admiralty Act provided a remedy in Admiralty *in personam* against the United States of America which was an exclusive substitute for all other remedies. The Fleet Corporation and Consolidated Navigation Company had contended *inter alia* before this court, that they did not employ the crew, and that the United States did, and that the judgment against them was invalid for that reason. Petitioner's Brief in the *Lustgarten* case, pp. 22, 23. This court did not pass on the question of responsibility of the agent for the torts of the crew. It assumed for the purposes of its decision that *both* defendants employed the crew. If it had not done so, the question of jurisdiction would not have been before the court for decision.

The nub of the decision is contained in one sentence:

> "We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." 280 U. S. 320, at p. 327.

This exclusiveness was not primarily a limitation respecting the suability of certain possible defendants but rather a limitation respecting the courts where litigation involving a particular subject matter might be brought. Solely as an incident of such a limitation the United States and its wholly owned corporations were the only entities which were suable in Admiralty. In result, other agents of the United States were not suable at all. They were

not suable elsewhere than in Admiralty because other courts did not have jurisdiction of the subject matter. They were not suable in Admiralty because the Suits in Admiralty Act did not describe them as permissible respondents. The United States and its wholly owned corporations were so described. No one, therefore, could complain that, if he had a good case, he was prejudiced because the defendant was irresponsible or because the real party in interest was not before the court.

Thus, this court said, at page 327:

> "Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred." (Italics ours.)

Accordingly, the judgment which was against both the United States Shipping Board Emergency Fleet Corporation and against Consolidated Navigation Corporation, the private operating agent, was reversed, with directions to dismiss the complaint against both. 280 U. S. 320, 327. Therefore, Consolidated Navigation Corporation, against whom there was a judgment for over $10,000, on the theory that it was liable as the employer of the captain who committed the negligent act, was held not to be suable elsewhere than in Admiralty, and therefore not suable at all.

In the light of the above-quoted passage from the court's opinion, there can be no doubt that this court decided, and intended to decide, that the private operating

agent in the *Lustgarten* case could not be sued at all. That passage was not a mere "dictum" (cf. petitioner's brief, p. 2). It was not an inadvertence (cf. petitioner's brief, p. 24) and it was not a "slip" (cf. petitioner's brief, p. 3). It was language wholly appropriate and necessary to explain what the court actually did. The court reversed a judgment for over $10,000 against the private operating agent.

The *Lustgarten* case is not an isolated case, although most of the petitioner's difficulty is caused by treating it as if it were. Instead, it is the logical result of cases which preceded it and which also construed the Suits in Admiralty Act. Those cases must be read with it in order to understand the construction intended by the court.

The first of those cases is *Eastern Transportation Company* v. *United States*, 272 U. S. 675 (1927). The holding in that case is expressed succinctly by the following excerpt from the opinion in the case of *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Company*, 276 U. S. 202, at 212 (1928):

> "• • • while the main purpose of the Act was to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations, and to substitute for a suit *in rem* one *in personam* attended with the incidents of a proceeding *in rem* in which the personal liability of the United States toook the place of the vessel, *the act also had a wider effect and created a broader personal obligation of the United States as the owner of an offending vessel, like that of a private owner*, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem*." (Italics ours.)

The second case is the *Rosenberg* case, just cited. This case held that the two types of libel *in personam* referred

to above, one of which was a substitute for a libel *in rem* and the other a means of enforcing the newly created personal obligation of the United States, were the exclusive remedies which could be exercised *in Admiralty* against the United States and its wholly owned corporations for all maritime claims arising out of the possession or operation of merchant vessels of the United States and such corporations. This court said, with reference to the Suits in Admiralty Act, at page 213:

> "It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts.
>
> In view of these provisions of the Act we cannot doubt that it *was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels.* And nothing in its legislative history indicates a different purpose." (Italics ours)

The *Lustgarten* case took the ultimate step which had been foreshadowed by the preceding cases. It held that the two types of libel *in personam* referred to in *Eastern Transportation Company* v. *United States*, 272 U. S. 675, are the

exclusive remedies in all courts "on all maritime causes of action" arising "out of the possession or operation of merchant vessels by or for the United States." 46 U. S. C. § 741, 280 U. S. at 326. It is merely incidental to that restriction of remedy that the available admiralty remedies are operable only against the United States or its wholly owned corporations.

Therefore, it was in the light of the foregoing that this court used the words which we re-quote:

> "We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it." 280 U. S. 320, at page 327.

As construed by this court, therefore, the Suits in Admiralty Act expressed a public policy on the part of Congress to require that claims on account of maritime torts involving government-owned vessels be decided in Admiralty only, where the United States could present directly any defenses it might have to its direct or ultimate liability. As a necessary part of this public policy, suits could not be permitted against its agents in other courts, where the United States would not have control of the litigation, and, thus, would not be in a position to offer the best available defenses. Thus, the immunity from suit conferred upon the agent was not done by way of conferring on him a privilege. The real purpose was the protection of the United States, and it was incidental to this protection that the agent was immune from suit. If the agent was personally at fault, it was for the United States only to decide what measures might be taken against him.

B. The Application of the Lustgarten Case to This Case.

The cause of action on which Mrs. Brady sued was given by the New York Death Act, Decedent Estate Law, Article 5, § 130; Death on the High Seas Act, 46 U. S. C., §§ 761, 767. If the *S.S. Unicoi* had been privately owned or operated, a proceeding in Admiralty could have been maintained to enforce it. The cause of action was maritime. *The Admiral Peoples*, 295 U. S. 649 (1934); *Western Fuel Company* v. *Garcia*, 257 U. S. 233 (1921). Cf. 46 U. S. C. § 742.

The *S.S. Unicoi* was owned by the United States, and was "operated • • • for the United States" by the defendant. The contract said so. There was no evidence to the contrary. Temporary Operating Agreement. R. 22. Cf. 46 U. S. C. § 741.

The cause of action on which recovery was sought arose out of the "operation of a vessel • • • for the United States." *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten*, 280 U. S. 320, at 326. The alleged negligence related to the operation of furnishing a defective ladder as a means of access to the vessel.

It follows that the exclusive remedy was to sue in Admiralty under the Suits in Admiralty Act, making the United States a party respondent, as therein provided, and that the judgment rendered below at common law against Roosevelt Steamship Company, Inc. was without legal authority because, so far as it operated the vessel at all, it did so "for the United States".

In principle, it follows from the Lustgarten decision that, if the cause of action is maritime and it arises out of the operation of a merchant vessel "by or for the United States", suit therefor must be brought pursuant to the provisions of the Suits in Admiralty Act. This is so, irre-

spective of the terminology which may be used in describing the relationship to the United States of the persons or corporations who, while acting for the United States, may be either closely or remotely connected with the tort. Thus, whether such person or corporation be a servant, i.e. agent subject to United States control (Rest., Agency, Section 220, comment on subsection (1): a); superior servant, i.e. agent subject to United States control, such as a ship captain or a general manager (Rest., Agency, Section 220, comment on subsection (1): a); agent acting independently of United States control but with fiduciary obligations to the United States, (Rest., Agency, Section 220, comment on subsection (1): c); or an independent contractor i.e. agent acting independently of United States control and without fiduciary obligations, (Rest. Agency, Section 220, comment on subsection (1): c); jurisdiction to hear the cause is confined within the limits prescribed by the Suits in Admiralty Act, provided only that the cause of action arose out of the operation of a United States owned merchant vessel "by or for the United States." If, on the other hand, the cause of action arose out of the operation of a United States owned vessel which was not being operated "by or for the United States" but rather by or for a genuine bareboat charterer, the restrictions of the Suits in Admiralty Act would not apply. Under such circumstances, the title to the vessel would be the only link connecting the United States to the operation. Such operation would not be "by or for the United States." It would be by and for the bareboat charterer, whose interest, financial and otherwise, would be the only one involved in the operation.

Roosevelt Steamship Company, Inc. was neither an independent contractor nor an agent acting independently of the control of the United States. Rest. Agency, Section

220, comment on subsection (1): c. Rightly construed, the contract shows that Roosevelt Steamship Company, Inc. was merely a corporate superior servant. It provided the managerial talent necessary to operate a steamship line in the same way and to the same extent that an individual might do it if he were hired as a general manager by the United States. Rest. Agency, Section 220, comment on subsection (1): a.

Decided cases which illustrate the legal principles applicable here and set forth in the foregoing citations from "Restatement of the Law of Agency", are as follows:

Folwell v. *Miller*, 145 Fed. 495 (1906), Second Circuit;

Wahlheimer v. *Hardenbergh*, 217 N. Y. 264 (1916) (opinion by Cardozo);

Smith v. *Rutledge*, 332 Ill. 150 (1928);

Bath v. *Caton*, 37 Mich. 199, 202 (1877);

Ellis v. *Southern Railway Co.*, 72 S. C. 465 (1905);

Johnson v. *City of Memphis*, 77 Tenn. 125 (1882);

Brown v. *Lent*, 20 Vt. 529 (1848);

Parker et ux. v. *Cone, et al.*, 104 Vt. 421 (1932);

City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.* 1927 A.M.C. 1778, 84 Cal. App. 413 (1927).

In *City of Los Angeles* v. *Los Angeles Pacific Navigation Co. et al., supra*, the court had before it for decision the precise point of the relation between a managing agent of the United States and members of crews of United States owned vessels. The defendant was a private corporation, acting as a managing agent for the United States of America under a contract known as the "MO 3

Contract", which was in all material respects the same as the contract between the United States of America and Roosevelt Steamship Company, Inc., in this case. A merchant vessel owned by the United States had been assigned to the defendant to "operate" pursuant to the terms of the contract and had come into collision with a ferry boat belonging to the plaintiff. It was claimed that the defendant was liable, on the ground that the captain of vessel, who was negligent and had caused the collision, was the employee of the defendant.

The court examined the contract, reviewed the authorities and in a well-considered opinion held that the captain was not the employee of the managing agent, and that the latter, accordingly, was not liable.

Like any individual general manager, defendant was an agent. Rest. Agency §1. Like such an individual it was subject to the principal's right to control the physical conduct of the performance of the service. Rest. Agency §2. Temporary Operating Agreement, Clauses 1, 6, 7, 8, 11, 12. R. 22, 24, 25, 26, 27. The premises. *i. e.*, the vessels on which the service was to be performed, belonged to the principal. Rest. Agency §220, (2) e. Such an individual would be a servant albeit a superior servant. Rest. Agency §220, comment on subsection (1): a. A proper regard for realism requires that the defendant, although a corporation, be held to have the same status.

"Two corporations stand toward each other in general just as two persons stand". *Fletcher, Cyclopedia Corporations*, Vol. 1, p. 23.

In *City of Los Angeles* v. *Los Angeles Pacific Navigation Co. et al., supra*, and in *Smith* v. *Rutledge, supra*, a corporation was treated as a superior servant and held not liable for the negligent acts of persons acting on behalf of the principal.

Incidentally, in *City of Los Angeles* v. *Los Angeles Pacific Navigation Company, et al., supra,* the court dismissed the contention that the managing agent was a charterer or an owner *pro hac vice* as obviously unsound. It is obviously unsound when made in this case. Petitioner's Brief, pp. 9, 14.

Indeed, it is only by carefully culling from the operating contract a few sentences, (pp. 8, 9) by presenting even these few sentences incompletely, (pp. 8, 9) and by the constant reiteration throughout the brief of such words as "charter", (p. 9), "owner *pro hac vice*", (p. 14), "independent operator" (p. 2), "independent contractor" (p. 3), "independent agent", (pp. 13, 14), "private enterprise", (p. 18), "private operator", (pp. 6, 7, 17, 19) without offering anything at all to justify the use of such contradictory and deceptive terminology in this case, that the petitioner seeks to support a flimsy argument that the agent in this case was different from the agent in the *Lustgarten* case. The petitioner is not concerned very much with showing what the difference is. But there is a difference, says petitioner, and, having said it, is done. Petitioner's brief, p. 17.

The truth is that the two agents are indistinguishable, as a comparison of the contracts involved in the two cases will show. For purposes of easy comparison, we have appended to our brief submitted in opposition to the petition for certiorari relevant provisions of both contracts.* In both cases, there was a private corporation in which the United States owned no stock, both corporations were

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* The citations there given for the provisions of the contract in the Lustgarten record are for that record as printed in the Circuit Court, and are as follows:

R. 329, 329, 330, 336, 330, 330, 336, 331, 336, 331, 332, 330.

Corresponding citations in the Supreme Court record are as follows:

R. 177, 177, 177, 181, 177, 177, 180, 178, 180, 178, 179, 177.

presumably solvent, both agreed to act as agent for the United States and under its supervision, both agreed to man, equip, victual and supply and operate the vessels, for the United States, under the trade name of the United States, to keep the vessels and their equipment in an efficient state, and to do all this with reasonable care or with due diligence, the United States paying all the bills, and for satisfactory performance both corporations agreed to furnish a bond. In both contracts, sub-agents, *i. e.*, ship's agents in outports were not to be considered agents of the United States but of its private corporate agent. In both contracts, the expenses were for the United States exclusively, but in the Consolidated contract, unlike the one involved in this case, the agent received a compensation for his services.

Obviously, the petitioner is embarrassed by the *Lustgarten* case, and particularly by the result so far as it affected Consolidated Navigation Corporation. In the petition to this court, petitioner copied the error of the dissenting judge in the Circuit Court of Appeals, and said that the *Lustgarten* case was distinguishable in that the judgment there was for maintenance and cure. Now that the petitioner has discovered that this statement was untrue, petitioner drops that contention and picks up another. Accordingly, much time has been devoted to constructing a supposed distinction on the foundation of erroneous statements with respect to the nature of the agency in the *Lustgarten* case as compared to the nature of the agency in the case at bar.

It is said that the M. O. 3 and the M. O. 4 Agreements were different from the one in the case at bar. Petitioner's Brief, 17. However, the difference is not pointed out. Comparison will show that there is no material difference. It is said that the old relationship between the Shipping Board

(petitioner does not say United States) and its sub-agents has ended. Petitioner's Brief, 23. Nothing is cited which supports the meaning intended. The petitioner ignores the fact that the Merchant Marine Act, notwithstanding it was the intention of Congress to put the Government out of the shipping business eventually, provided expressly that, until the United States could retire gracefully, the United States should stay in it. 46 U. S. C. 1194; Merchant Marine Act of 1936, Section 707 (c).

In the light of this circumstance, it is therefore idle for the petitioner to dwell on the governmental function performed by the Consolidated Navigation Company as if to imply that Roosevelt Steamship Company, Inc. did not perform the same governmental function. Roosevelt Steamship Company, Inc., as the statute and as the contract show, was performing a governmental function, and doing nothing else. Furthermore, nothing is gained by referring to Consolidated Navigation Company by such minimizing terms as "sub-agent" or "mere sub-agent", as if, by the mere choice of words, one could create facts. Petitioner's Brief, 16, 18, 19. The fact is that in the *Lustgarten* case Consolidated Navigation Corporation was held liable for a tort committed by the master of a government vessel and that this court held that, if it was the kind of an agent which could be held liable for such a tort, the remedies of the Suits in Admiralty Act were exclusive. Indeed, it may be said that this court could not have rendered the decision in the *Lustgarten* case unless it first assumed that Consolidated Navigation Corporation was such an agent as to make it the employer of the crew. Consequently, if it is true that Roosevelt Steamship Company, Inc. was the employer of the crew, the rule announced in the *Lustgarten* case for Consolidated Navigation Corporation is applicable to it.

Even the Circuit Court of Appeals in the Second Circuit has recognized that it is "indeed a serious matter to hold responsible for the navigation of a vessel the agent who procured the navigators." *New York & Cuba Mail S.S. Co.* v. *United States* (opinion by Judge Hough), 12 F. (2d) 348 (1926); cert. denied 273 U. S. 719.

The Chief Justice of this court, while Attorney General, expressed the opinion that such agents are not the employers of the crews but that the United States is. 34 Opinions of the Attorney General 363.

In Point II hereof, we shall deal further with the case of *Quinn* v. *Southgate Nelson Corporation* (opinion by Judge Frank), 121 F. (2d) 190 (1941), which seems to state a different rule, and which, basically, is responsible for the confusion which it is hoped will be removed by a decision by this court.

C. The Agent's Right to Indemnity and the Supposed Necessity for Showing it Independently.

It has been asserted that the *Lustgarten* case holds that the Suits in Admiralty Act is exclusive only when, in addition to its appearing that the operation was "by or for the United States", it appears also that the United States would be legally obligated to provide the money with which to reimburse the person or corporation acting for it for sums which the latter might have to pay in satisfaction of judgments obtained elsewhere than in an action brought under the Act. *Shea* v. *United States Shipping Board Emergency Fleet Corporation & Export Steamship Corporation*, 253 N. Y. 17 (1930); 56 Harv. L. Rev. 304. This thought proceeds from some incidental words which appear in the opinion in the *Lustgarten* case, 280 U. S. 320 at 326, and which are as follows:

"On the facts above stated, it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. §8, Suits in Admiralty Act; 46 U. S. C., §748. Cf. Minnesota *v.* Hitchcock, 185 U. S. 373, 387."

In substance, it is contended that because the financial interest of the United States was mentioned in the opinion that interest is a jurisdictional fact which must be demonstrated in each case or else the jurisdiction of Admiralty is not exclusive.

It is obvious that the court did not say this. It is probable that it did not intend that meaning. The statute itself prescribed the jurisdictional facts which should determine where it should be applied, namely, that the operation of a government-owned merchant vessel was "by or for the United States." The financial interest of the United States followed as a necessary conclusion from such operation.

1. *The financial interest of the United States was demonstrated unmistakably.*

Whatever the court may have intended, it cannot affect this case, for the financial interest of the United States was demonstrated below to the same extent, and to a greater, than was done in the *Lustgarten* case.

Here, the operation of the vessels was carried on in the name of the United States, *i.e.*, the trade name owned by the United States. There, it was done in the trade name of the United States. Clause 17, Lustgarten record, p. 181. Temporary Operating Agreement, Clauses 4 and 6. R. 23,

24. Even if the operation had been carried on in the name of the agent only, the principal would be obliged to indemnify the agent for moneys disbursed by him in satisfying judgments for tort caused by the negligence of employees. Rest. Restitution, §98, Comment on Clause b, Illustration 5. *Moran Towing & Transportation Co., Inc.* v. *Navigazione Libera Triestina, S.A.*, 92 F. (2d) 37 (1927), cert. denied 302 U. S. 744. *A fortiori*, the obligation exists when the business is carried on in the principal's name.

In cases like these, the agent is not at fault, personally. The fault is that of the employee. The employer may have to pay, but he is not at fault. It is liability without fault. (1932) 81 Pa. L. Rev. 130 at 142. Where the agent who is held liable as an employer is not at fault there is no reason to deny him indemnity. 45 Harv. L. Rev. 349, 351, note 10. Williston on Contracts, vol. 4, §1026, p. 2842.

Indeed, where, as in this case and in the *Lustgarten* case, the business is carried on in the name of the principal, the agent is generally held not to be an employer, and, therefore, not liable at all. Rest. Agency §358. We shall deal with this in Point 2.

In both the *Lustgarten* case and in this case the obligation of the principal to indemnify the agent did not arise solely by operation of law, as noted above, but by express contract as well. In the *Lustgarten* case the United States, acting through the Fleet Corporation, agreed expressly to bear the operating expenses. Clause 3, Lustgarten Record, page 177. Here, the United States, itself, agreed expressly to do so. Temporary Operating Agreement, Clauses 6 and 7, R. 24, 25.

Operating expenses in a business of this kind include disbursements made by an agent, i.e., a receiver, to satisfy

tort judgments caused by the negligence of employees. It has been so held.

Reconstruction Finance Corporation v. *Missouri-Kansas-Texas R. Co. et al.*, 122 F (2d) 326, 335 (1941);
Bereth v. *Sparks*, 51 F. (2d) 441 (1931).

Congress has passed a statute which directs that such disbursements be included among operating expenses, even when they result from torts occurring before receivership or bankruptcy, 11 U. S. C. §205 (n).

Furthermore, in the case at bar the legal representative of the United States appeared, with authority, and informed the court of the financial interest of the United States. R. 13, 83, 84, 85. The United States thus recognized and asserted its obligation to its agent to indemnify it in case it should be adjudged liable for the negligent tort of an employee.

Furthermore, the defendant was ready and offered to prove that in actual practice the United States reimbursed the agent for the money used to pay such judgments on the ground that such disbursements were part of the operating expenses. The offer was refused. R. 88.

Surely, if this case turns on the existence of an obligation by the United States to reimburse the agent, and there is any room for controversy as to what is meant by "expenses incident to the management and operation of the Line, the maintenance and operation of the vessel, and all other business activities pertaining thereto" the agent should be permitted to show what the words meant to the parties to the contract in actual practice. Temporary Operating Agreement, Clauses 6, 7, 19, R. 24, 25, 29.

Cavazos v. *Trevino*, 73 U. S. 773, 785 (1867);
Sherman v. *Consolidated Dental Mfg. Co.*, 202 Pa. 446 (1902);
Goddard v. *Crefield Mills*, 75 Fed. 818 (1896);
Block v. *The Columbian Insurance Co.*, 42 N. Y. 393, 400 (1870);
U. S. Printing & Lithograph Co. v. *Powers*, 233 N. Y. 143, 151 (1922);
N. Y. Central Railroad Co. v. *Stoneman*, 233 Mass. 258, 263 (1919);
Crowe v. *Bixby*, 237 Mass. 249, 253 (1920).

The parol evidence rule has no application in any event to a suit where the contract is involved merely collaterally.

Robert v. *United States Shipping Board Emergency Fleet Corporation*, 240 N. Y. 474 (1925); (opinion by CARDOZO, J.);
Indianapolis Glove Co. v. *United States*, 96 F. (2d) 816, 819 (1938).

At the very least, therefore, if the judgment of the Circuit Court should be reversed, on the ground that the financial interest of the United States should have been shown independently and was not, there should be a new trial so that the agent *and the United States* may have a fair opportunity to present relevant evidence.

Even where it has been held that the *Lustgarten* case stands for the proposition that the financial interest of the United States must appear independently, it has been held also that the burden is on plaintiff to show that the United States has no financial interest. *Weinstein* v. *Black Diamond Steamship Corporation*, 40 F. (2d) 590, certiorari denied, 283 U. S. 837.

Here, the plaintiff did nothing except to put in evidence the operating agreement and the testimony of a witness who said that the crews of vessels were not employed by the defendant in any respect. Not only did the plaintiff fail to carry his burden, but he was successful in obtaining a ruling from the court that prevented the defendant from adducing proof which it was plaintiff's duty to bring forward.

2. *The irrelevancy of the contract provisions relating to insurance and a bond.*

The provisions of the contract respecting liability insurance and a liability bond, (clauses 14 and 18, R. 28, 29,) and the extravagant and unsupported statements in petitioner's brief with respect to the existence and the provisions of the liability insurance and the bond, do not serve to carry the petitioner's burden in any respect. Petitioner's Brief, pp. 13, 20, 22. The record contains only the provisions of the operating contract, and the statements of petitioner's counsel with respect to the provisions of a liability insurance policy are not only unsupported but untrue. Petitioner's Brief, pp. 13, 20.

The contract provided merely that the agent should provide protection and indemnity insurance "for the account of the Owner", i. e., insuring the United States. Clause 14, R. 28. There is no provision in the contract requiring the agent to insure itself. Whether it did so independently of any provision of the contract is not a matter of record in this case. Just what insurance was obtained for the United States does not appear, although counsel for the defendant informed the trial court that he was ready to prove that the insurance was subject to a "deductible" which left the United States wholly uninsured for a part of what might be paid in any particular case. R. 89, 90.

The bond referred to in Clause 18 of the contract (R. 29), and which the petitioner refers to as a liability bond, (Petitioner's Brief, p. 20) had nothing to do with tort claims. The contract required the usual surety bond to cover the honest and faithful performance of the financial aspects of the Governmental enterprise.

At all events, proof that the United States and its agent were fully insured for liability and loss on account of negligent torts, which, seemingly, they were not, would not show that the United States did not have an independent financial interest in the judgment against its agent. It would prove exactly the contrary, for it would show that the United States, realizing that its financial interest was directly involved, did as any business man would do, that is, paid the premium as an operating expense and insured the risk.

Accordingly, the taking out of an insurance policy to cover the risk proves nothing which can be of any help to the petitioner in this case.

Finally, what is the financial interest of the United States if the insurance company is insolvent? And what is its financial interest if the agent fails, with good excuse, to obtain insurance? This can and has happened.

3. *The Lustgarten case does not require that the financial interest of the United States be demonstrated.*

So far we have assumed that there is something to be said for the contention that this court in the *Lustgarten* case meant to say that the financial interest of the United States must be shown in every case as a jurisdictional fact.

However, such an intention is improbable, and is not to be inferred from what was actually said. In the first place, such a holding would lead inevitably to the trial of

collateral issues without end, and, therefore, would be an inappropriate criterion for the application of a statute. In a given case the ultimate obligation of the United States to indemnify its operating agent might depend on the state of the accounts between them or on various defenses and counter-claims. The collateral controversies which would arise in determining such a matter could be endless. The opinion in *Weinstein* v. *Black Diamond Steamship Corporation*, 40 F. (2d) 590, 592, is illustrative. Therefore, it is unlikely that the court intended to construe the Suits in Admiralty Act in such a way as to make the financial relations between the United States and its operating agent a collateral issue in every negligence action in which someone should think that it suited his interest to sue the agent at common law rather than the United States in Admiralty.

In the second place, an examination of the basis of the decision in the Lustgarten case makes it probable that the court meant to decide that the Fleet Corporation and Consolidated Navigation Company were public agents, as to which Congress could prescribe, if it saw fit, an absolute or a partial immunity.

In the brief submitted on behalf of the Fleet Corporation and Consolidated Navigation Company it had been contended that both were public agents and therefore wholly immune. Petitioner's Brief, Lustgarten case, pp. 28 and 29. Therein it was argued that Section 8 of the Suits in Admiralty Act and the case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, required such a conclusion. But the court did not conclude that Congress intended to prescribe a complete immunity. It held that Congress intended to prescribe a partial immunity, and, as a part of the mechanics for accomplishing this result, to submit the United States, or its wholly owned corporation, as a personal defendant, but in Admiralty only.

Thus, the reference to the source of the money which might be used to pay judgments is to be taken as the court's statement of a legal conclusion from its decision that both the Fleet Corporation and Consolidated Navigation Corporation were public agents, i.e., acting "for the United States." The reference in the opinion to Section 8 of the Suits in Admiralty Act and to *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, would seem to indicate that the court accepted, in part at least, the contention of the petitioners in that case that Congress intended to use its power to extend its immunity to public agents, but only to the extent indicated by the holding of the court. *Cf. Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524 (1940).

Since the Lustgarten case was decided, this court has stated with clarity some of the principles which should guide in determining the Congressional intent with respect to extending immunity to public agents.

> *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519 (1930);
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> *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935);
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> *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381 (1939);
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> *Reconstruction Finance Corporation* v. *Menihan*, 312 U. S. 81 (1940).

But in none of these cases has the power of Congress ever been questioned. As indicated in the *Keifer* case, the question is always "has it done so?" 306 U. S. 381, at 389.

The *Lustgarten* case established by a direct decision the Congressional intent with respect to public agents such as the one involved herein. Moreover, the construction of the Congressional intent, as therein set forth, was not such as to bring "governmental immunity from suit into disfavor." 306 U. S. 381, at 391. If anything, that construction was

such as to deserve the favor of and preservation by this court, for it did not deny to meritorious suitors all remedy for their injuries, but merely prescribed a substitute remedy in Admiralty which, while exclusive, was and is adequate.

This case, therefore, represents an attempt to sue the United States elsewhere than in Admiralty under the pretense that a suit against a public agent of the United States is not within the prohibited area defined by the Suits in Admiralty Act. That was tried in 1929 and failed then. Thirteen years later it should not succeed.

POINT II.

ROOSEVELT STEAMSHIP COMPANY WAS NOT THE EMPLOYER OF THE NEGLIGENT MEMBERS OF THE CREW WHO COMMITTED THE TORT.

Much of the argument which would appear under this heading if this were the only point involved already appears under the previous point. There is no need for repetition of the argument. For convenience, however, the relevant authorities will be re-cited.

The question of who employs the crew of a United States-owned merchant vessel, the United States or its agent, has not been decided by this court. Moreover, this court declined to decide it when asked to do so in the *Quinn* case, 314 U. S. 682. If certiorari had been granted in that case, it might have resulted in bringing "governmental immunity into disfavor." 306 U. S. 381, at 391. Mrs. Quinn could not sue the United States under the Suits in Admiralty Act because the tort was not maritime and, therefore, she could not sue the United States at all. If she had not been permitted to keep the judgment against the agent, however wrong the decision was which gave it to her, she would have been unable to sue anybody for the tort. Although she did

have a right to obtain Federal compensation from the United States, the petition for certiorari did not so inform this Court.* That is not the case here. The Bradys were given a right to sue the United States, which right, by free choice, was not exercised because Mrs. Brady preferred the compensation remedy against the United States. See Statement, p. 2 of this brief.

Therefore, when the present suit is brought against the public agent on the pretense that it is an actual third party rather than a representative of the United States, there is every reason to decide the basic question: who employed the crew?

The question should be decided now and put to rest.

So far as concerns those who write the contracts of agency with which we are concerned, there is no question as to what is the precise nature of the relationship between the United States and the private operator-public agent who manages government-owned vessels for the United States.

It is only when a court proceeds to re-write the contract otherwise than the parties intended, as in the *Quinn* case, that confusion arises. *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190. However, the parties are adequate to the situation which then arises. They re-write their contracts in the hope that, finally, they will be in such form that the mistakes of the court will not be repeated. Thus, in this situation, as a result of what happened in the *Quinn* case,** the following clauses have been written into the agency contracts which the United States now makes with operating agents through the agency of the War Shipping Administration.

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* So we are informed by the one who wrote it.

** This is known from persons who participated in the conferences which led to the amendments.

"ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time."

"ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder." Fed. Reg. v. 7, pp. 7561, 7562.

The *Quinn* case holds that a managing agent for the United States employs the crews of government-owned merchant vessels on the agent's own behalf. It had to hold that in order to hold the agent liable, but at no place in the opinion does a direct statement to that effect appear.

The court first makes the point "That a principal is liable for a wrong does not necessarily immunize his agent." 121 F. (2d) 190, at 191.

That, of course, was true, but it did not decide whether the defendant was liable in the first place. The court, for the purposes of this statement, merely assumed that the defendant was liable, and then reasoned that because in some cases both principal and agent can be held liable, such instances of double liability were relevant to the facts of that case. That was a complete *non-sequitur*. An agent can be liable for his own tort. A principal can be liable along with the agent for the same tort. But it does not follow that there cannot be cases where, assuming that it is the principal who is liable, *ex hypothesis* the agent cannot be liable as a principal. In some cases the very fact that one person is held liable as a principal means that someone else is not a principal, and, therefore, cannot be held liable by way of *respondeat superior*.

In explaining its decision the court said, at page 191 that:

> "Common sense and the precedents make appellant liable on the facts of this case."

Without doubt, reliance on proper precedents is a rational legal process, but there is no available means by which anyone can ascertain what the court's idea of "common sense" may be.

However, the precedents on which the court relied appear in the opinion to be a single case, namely, *United States Shipping Board Emergency Fleet Corporation* v. *Greenwald*, 16 F. (2d) 948 (1927).

Apart from such a citation of precedent, no reason was given for the court's conclusion except that the powers given by the United States to its agent gave the agent *de facto* control which it was not shown had been actually taken away by any interference on the part of the United States. This is insufficient for the holding made.

A superior servant, such as a general manager or a captain of a vessel, has the same *de facto* control, and, when a captain is on his vessel at sea, who is there to interfere with that control? And, yet, it is well known that such persons are servants at all times, albeit superior servants. Rest. Agency, Section 220, comment on subsection (1):(a).

Accordingly, the question which was before the court in the *Quinn* case did not depend on whether Southgate Nelson Corporation had a *de facto* control, but on the terms which governed it in the exercise of that control as shown by the contract with the United States or by any other relevant evidence. Rest. Agency, Section 220, and following statement.

The Circuit Court of Appeals apparently did not inquire into or pay attention to this vital matter. Indeed, when the court noted the disturbing circumstance that the compensation of the agent was "relatively small" (in fact it was nothing except expenses, as the court was informed, Appellant's Brief, p. 18) it said that this circumstance was "of no importance for that was a matter of contract between it and the Commission and cannot affect appellant's liability to third persons." 121 F. (2d) 190, at 192.

To say that the contract between the parties is not the only evidence which may determine the nature of the relationship as it affects third parties is, of course, true. *Robins Dry Dock & R. Co.* v. *Navigazione L. Triestina, S. A., et al.*, 261 N. Y. 455, 463 (1933). Other facts and circumstances may be relevant. But it is an entirely different and erroneous statement to say that a matter of contract between the principal and agent is of no importance at all in determining the agent's relationship to third persons. The following cases and authorities are to the contrary:

Robert v. *United States Shipping Board Emergency Fleet Corporation*, 240 N. Y. 474 (1925) (opinion by Cardozo, J.);
Folwell v. *Miller*, 145 Fed. 495 (1906), Second Circuit;
Wahlheimer v. *Hardenbergh*, 217 N. Y. 264 (1916) (opinion by Cardozo, J.);
Smith v. *Rutledge*, 332 Ill. 150 (1928);
Bath v. *Caton*, 37 Mich. 199, 202 (1877);
Ellis v. *Southern Railway Co. and P. I. Welles*, 72 S. C. 465 (1905);
Johnson v. *City of Memphis*, 77 Tenn. 125 (1882);
Brown v. *Lent*, 20 Vt. 529 (1848);
Parker, et ux. v. *Cone, et al.*, 104 Vt. 421 (1932);
City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.* (1927), A.M.C. 1778, 84 Cal. App. 413 (1927);
Restatement of the Law of Agency, § 1, 2, 5, 219, 220, 221, 222, 250, 251, 255, 358, 361, 362.

The one precedent cited by the court, namely, the *Greenwald* case, *supra*, proceeds upon the theory that the managing agent was an owner *pro hac vice*. What the contentions of the parties were in that case is not known, but it is inferable from the opinion that both parties defendant were endeavoring to escape from the law of the District of Columbia, and it suited that purpose to claim that A. H. Bull & Company, a New Jersey corporation, was an owner *pro hac vice*. If so, it was thought that the District of Columbia law would not apply. But the court held that even though A. H. Bull & Company was the *pro hac vice* owner, the District of Columbia law applied. 16 F. (2d) 948, at 951.

A holding that an agency contract such as the one involved here is a bare-boat or demise charter cannot be justified on any theory of law.

See Robinson on Admiralty, p. 594, and cases cited in the notes; 46 U.S.C., §186.

Thus, the *Quinn* case has no rational basis for the result which the court reached, and should now be overruled.

POINT III.

THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IN DISMISSING THE COMPLAINT, ON THE GROUND THAT THERE WAS NO LIABILITY ON THE DEFENDANT. HOWEVER, IF IN THIS CASE, AS IN THE LUSTGARTEN CASE, THIS COURT SHOULD CHOOSE TO ASSUME THAT THE COURTS BELOW WERE CORRECT IN THEIR DECISIONS ON THE MERITS, OR SHOULD DECIDE THE MERITS ADVERSELY TO THE CONTENTION MADE HEREIN, THIS COURT SHOULD THEN HOLD THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THE CAUSE BY REASON OF THE PROVISIONS OF THE SUITS IN ADMIRALTY ACT.

Respectfully submitted,

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